

APPEAL NO. 032769
FILED DECEMBER 11, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 24, 2003. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on August 19, 2002, with a 0% impairment rating (IR) as assessed by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). The claimant appeals these determinations, contending that she reached MMI on May 6, 2003, with a 20% IR as assessed by her treating doctor. The respondent (carrier) urges affirmance of the hearing officer's decision.

DECISION

Reversed and remanded.

The evidence reflects that the claimant sustained a compensable lumbar injury in _____. She received conservative medical treatment initially, but ultimately underwent a two-level lumbar fusion in January 2003. The claimant was examined by the designated doctor, Dr. P, on March 15, 2002, at which time Dr. P noted that the claimant had not yet reached MMI. Subsequently, the claimant received sacroiliac injections and Dr. P examined the claimant for a second time on August 19, 2002, and found that the claimant reached MMI on that date with a 0% IR. The claimant's treating doctor, Dr. R, a chiropractor, apparently disputed Dr. P's MMI/IR certification and in November 2002, the Commission forwarded a copy of Dr. R's letter, which is not in evidence, to Dr. P asking her to confirm whether her opinion remained the same. Dr. P responded that her opinion remained unchanged and confirmed that the claimant reached MMI on August 19, 2002, with a 0% IR. The claimant then underwent a two-level lumbar fusion in January 2003. In March 2003, the Commission sent another letter of clarification to Dr. P asking whether the surgery warranted a reassessment of the MMI date or the IR. Again, Dr. P confirmed that her opinion remained unchanged.

Subsequent to Dr. P's confirmation of the MMI date and IR, but prior to the date of the hearing in this case, the Commission issued Advisory 2003-10, effective July 22, 2003, which provides in part:

2. Clarification of Rating for Spinal Fusion(s).

For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4th Edition of the Guides to the Evaluation of Permanent Impairment). If preoperative x-rays were not performed, the rating may be determined using the following criteria:

* * * *

- b. Multilevel fusion meets the criteria for [Diagnosis-Related Estimate (DRE)] Category IV, Structural Inclusions, as **this multilevel fusion is equivalent to “multilevel spine segment structural compromise”** per DRE IV. [Emphasis in original.]

There is no evidence to indicate that preoperative flexion/extension x-rays were performed in this case. We have previously held that with regard to hearings conducted after July 22, 2003, involving IRs for spinal surgery which would be affected by TWCC Advisory 2003-10, it is error not to consider and apply that advisory. Texas Workers' Compensation Commission Appeal No. 032399, decided November 3, 2003. Accordingly we reverse and remand the case for the designated doctor to consider and apply Advisory 2003-10 in assigning the IR. As the MMI date may also be affected, we also remand for the designated doctor to determine whether the MMI date remains August 19, 2002, or whether a different MMI date is warranted.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LUMBERMENS UNDERWRITING ALLIANCE** and the name and address of its registered agent for service of process is

**DANIEL J. O'BRIEN
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DALLAS, TEXAS 75234-7625.**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge